STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

WILLIAM LARON JOHNSON

Defendant-Appellant.
_____/

Supreme Court No. _____

Court of Appeals No. 248480

Lower Court No. 02-4605FH

Gm 12/28/04

Calhoun
A. Garbrecht

CALHOUN COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

PETER JON VAN HOEK (P26615)
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AFL

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State

NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

BY: PETER JON VAN HOEK (P26615)
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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant William Laron Johnson was convicted at a jury trial in the Calhoun County Circuit Court of two counts of criminal sexual conduct in the third degree. On April 10, 2003, he was sentenced by Judge Allen L. Garbrecht to concurrent prison terms of 100 to 480 months. Defendant appealed as of right from the convictions and sentences.

On October 28, 2004, the Court of Appeals issued an unpublished, per curiam opinion affirming the convictions and sentences. See Appendix A.

The decision of the Court of Appeals is clearly erroneous and will cause manifest injustice to Mr. Johnson, the appeal concerns legal principles of major importance to the state's jurisprudence, and the opinion conflicts with decisions of this Court and of other panels of the Court of Appeals. MCR 7.302 (B).

Defendant has raised two issues in his appeal of right. The first is whether the trial court abused its discretion in permitting Mr. Johnson to be impeached at trial, over a timely defense objection, with evidence of his prior criminal convictions under MRE 609. Mr. Johnson did testify on his own behalf at the trial, and evidence of three prior convictions (larceny from a person, breaking and entering, receiving or concealing stolen property) was admitted during his testimony.

In ruling on the prosecution's motion to admit this evidence under MRE 609, the trial judge failed to adequately articulate on the record how the relevant factors had been weighed in reaching the result that the prior convictions could all be used for impeachment if Mr. Johnson elected to testify. Most importantly, the court failed to state why the prejudicial impact on the judicial process if Mr. Johnson refused to testify out of concern for the impeachment would not be sufficient to foreclose this impeachment. The trial at issue was essentially a one-on-one credibility battle between Mr. Johnson and the complainant. The evidence showed the complainant had admittedly

lied to the police in her initial allegations, and had given significantly inconsistent versions of the events in the past. The key issue in the case was the age of the complainant when the sexual acts occurred. Mr. Johnson's testimony was crucial to the defense theory that while he did engage in consensual sexual penetration with the complainant, those acts occurred when she was 16 years old, and not 15 as she alleged. Had the trial court directly considered the impact that the impeachment ruling could deter the defendant from testifying, that factor should have outweighed the probative value of the impeachment.

The Court of Appeals below failed to respond to Defendant's assertion that the trial judge did not consider the impact on the judicial process if Mr. Johnson would have elected not to testify. This Court should review the entire record, and the arguments made in the attached brief in support, and should either grant leave to appeal or peremptorily hold that the trial judge abused his discretion in overruling the defense objection to the impeachment evidence.

The second issue in the case concerned the sentencing. For the reasons stated in the attached brief, Defendant asserts the trial court erroneously scored him with points under Offense Variables 10 and 11 of the sentencing guidelines. The evidence did not support the trial court's finding that Mr. Johnson exploited the age of the complainant. Even under the prosecution's theory, the complainant was a month from her 16th birthday when the charged acts occurred. Mr. Johnson was age 20 at the time. There was no allegation of force, coercion, or injury in the case. The prosecution's argument in the trial court, that the judge accepted, was that since the charge at issue made the conduct illegal solely due to the age of the complainant, Defendant should be scored points under OV 10 for exploiting that age. This argument was essentially that the scoring should always occur where the charge in under MCL 750.520d(1)(a). However, the guidelines clearly do not require nor contemplate an automatic scoring of points under OV 10 for this charge. Only

where there is exploitation of an age differential should there be points assessed under this variable. The fact the complainant was allegedly a month shy of her 16th birthday already made the charged conduct a felony punishable by up to 15 years in prison. Absent any real showing that the complainant was particularly vulnerable due to her age (in this case the complainant was sexually active with at least one other person, who fathered her baby – a fact she admittedly lied about to the police), no further aggravation of the sentence should be approved due to scoring of points under OV 10.

As to OV 11, the Court of Appeals below erred in applying its prior case law precedent from People v McLaughlin, 258 Mich App 635 (2003). While the McLaughlin opinion, relying on the prior case of People v Mutchie, 251 Mich App 273 (2002), held that other penetrations, even if they independently resulted in felony convictions, could be scored under OV 11 because they did not constitute the one penetration that encompassed the sentencing offense, in both cases the other penetrations occurred during the same incident and circumstances as the sentencing offense, and thus "arose out of" the sentencing offense, as defined by the statute. In the case at bar, however, the second penetration used to score Mr. Johnson with 25 points under OV 11 occurred on a different date and under different circumstances than the sentencing offense (the second penetration was the other felony count in this case). As such, that penetration did not arise out of the current sentencing offense, and thus should not have been scored under OV 11. See Mutchie, supra. That second penetration could have been validly scored under OV 12 or 13, but not under OV 11.

This Court should find the trial court and the Court of Appeals clearly erred in overruling the defense objections to the scoring under the guidelines. That scoring placed Mr. Johnson in a higher range of the guidelines. This Court should peremptorily remand the matter for a resentencing, or grant leave to consider the correct scoring considerations under OV 10 and /or 11.

Defendant moves this Honorable Court to either grant this application for leave to appeal or any appropriate peremptory relief.

Respectfully submitted,

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Date: November 29, 2004

APPENDIX A

19997T
PVH

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM LARON JOHNSON,

Defendant-Appellant.

UNPUBLISHED
October 28, 2004

No. 248480
Calhoun Circuit Court
LC No. 02-004605-FH

Before: Whitbeck, C.J., and Jansen and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for two counts of third-degree criminal sexual conduct, MCL 750.520d. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the court erred in allowing him to be impeached with evidence of his prior convictions. A witness's credibility may be impeached with prior convictions if the convictions satisfy the criteria set forth in MRE 609. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). Crimes of theft are minimally probative, and are, thus, admissible only if the probative value outweighs the prejudicial effect. *People v Allen,* 429 Mich 558, 595-596; 420 NW2d 499 (1988). MRE 609(b) provides that the probativeness is to be measured by the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. In determining the prejudicial effect, "the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor." MRE 609(b) A trial court's failure to articulate its analysis on the record is error, but if it appears from the record that the court was aware of the relevant factors and its discretion, the error does not itself require reversal. *People v McDaniel*, 256 Mich App 165, 168; 662 NW2d 101 (2003).

The trial court reviewed the appropriate factors in determining that the probative value outweighed the prejudicial effect. The convictions were probative of defendant's credibility, and the convictions were not similar to the charged offenses. Although the court did not state on the record that the convictions were recent, it was made aware of the date of the convictions in the prosecutor's argument on the record, and there is no showing that the age of the convictions would have affected the court's ruling. *McDaniel, supra.* Thus, there is no error requiring reversal.

Defendant also argues that the trial court erred in scoring OV 10 and OV 11 at sentencing. The sentencing court has discretion in determining the number of points a guidelines variable should be scored provided that there is evidence on the record which adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). A scoring issue may also entail a question of statutory interpretation, which is reviewed de novo. *Id.*

MCL 777.40(1)(b) provides that OV 10 should be scored ten points if the offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status. Where complainant was fifteen years old and defendant was twenty, the court could determine that defendant exploited the victim's youth in committing the sexual assault. The fact that complainant was almost sixteen does not diminish the fact that defendant exploited her youth. Accordingly, the trial court properly exercised its discretion in scoring OV 10 at ten points.

MCL 777.41 provides that OV 11 should be scored twenty-five points if another criminal sexual penetration occurred, beyond the penetration that forms the basis of the conviction. In *McLaughlin, supra,* this Court found that where a defendant is convicted of multiple counts of CSC, a sentencing court should score the other penetrations, even though they were included in separate charges. *Id.*at 677. The trial court properly scored OV 11 for the penetration that was involved in the second count.

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Richard A. Bandstra

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, COURT RULES

STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Calhoun County Circuit Court, by jury trial, and a Judgment of Sentence was entered on April 11, 2003. A Claim of Appeal was filed on May 7, 2003, by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated April 10, 2003, as authorized by MCR 6.425(F)(3). This Court has jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A); MCR 7.204(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. **DID THE TRIAL COURT ABUSE ITS DISCRETION IN PERMITTING THE PROSECUTION, OVER A TIMELY DEFENSE OBJECTION, TO IMPEACH MR. JOHNSON WITH EVIDENCE OF HIS PRIOR FELONY CONVICTIONS UNDER MRE 609?**

Trial Court answers, "No".
Defendant-Appellant answers, "Yes".

II. **IS DEFENDANT ENTITLED TO A RESENTENCING WHERE THE TRIAL COURT ERRONEOUSLY OVERRULED DEFENSE OBJECTIONS TO THE SCORING OF OFFENSE VARIABLES 10 AND 11?**

Trial Court answers, "No".
Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Defendant-Appellant William Laron Johnson was convicted, at a jury trial in Calhoun County Circuit Court, the Hon. Allen L. Garbrecht presiding, of two counts of criminal sexual conduct in the third degree, contrary to MCL 750.520d(1)(a). The trial occurred on March 4, 2003. On April 10, 2003, Judge Garbrecht sentenced Mr. Johnson to prison terms of 100 to 480 months, to run consecutively to a term Mr. Johnson was serving as a parole violator. He now appeals as of right.

The prosecution theory in the case was that Mr. Johnson engaged in sexual penetrations on two different dates with the complainant, Lanquisha Durham, when she was under the age of 16. The defense admitted that Mr. Johnson did engage in consensual sexual relations with Ms. Durham, but only after her sixteenth birthday.

Subsequent to the selection of the jury, but prior to any testimony, the prosecution moved for permission to use of Mr. Johnson's prior criminal record for impeachment purposes if he elected to testify. Over a defense objection, Judge Garbrecht ruled the prosecution could use three prior felony convictions for impeachment. (I, 55-58).

The primary prosecution witness was Ms. Durham. She was born on December 14, 1985. (I, 72).[1] She testified she met Mr. Johnson through family members in 2001, when she was fifteen. Ms. Durham asserted she engaged in consensual sexual relations with him on a date in November, 2001, prior to Thanksgiving, at his house, and again also at his house on a different date in November. (I, 74-80). She acknowledged having previously testified in this case that she

[1] For the purposes of this brief, the trial transcript will be referred to by volume and page number, with Volume I and II representing the morning and afternoon sessions on March 4.

engaged in sexual relations with him at her house, but not asserted that act occurred after her 16th birthday in December, 2001. (I, 81).

Ms. Durham admitted she has a child, Lorenzo, who was born on August 8, 2002. (I, 83). She further admitted that at the preliminary examination in this case, held in November, 2003, she testified that Mr. Johnson was the father of her son. (I, 83). She denied lying at the examination, stating at that time she believed he was the father. (I, 83). She also admitted testifying as to an alleged incident occurring at her house when she was 15, but now stated she could not recall whether that prior testimony was true or not. (I, 83-84). Ms. Durham stated she had not wanted to testify at this trial, and did not want to see Mr. Johnson be incarcerated, but was required to be there by subpoena.

Ms. Durham acknowledged receiving a letter written by Defendant, that she later had to turn over to the police. (I, 85-87). The postmark on the letter indicated it was mailed in October, 2002. (I, 87). The letter was admitted into evidence during the direct examination of this witness. (I, 89).

On cross-examination Ms. Durham stated she was not aware of any criminal investigation having been started in this case as of August 8, 2002, when her son was born. (I, 91). She acknowledged telling Protective Services that she believed Mr. Johnson was the father of her baby after it was determined that her son must have been conceived in November, 2001, prior to her 16th birthday. (I, 91-92). Ms. Durham admitted she told the police that Mr. Johnson was the only person with whom she had ever had sexual relations. (I, 92). She admitted that her statement to the police was a lie, and that she now knows that Defendant is not the father of her son. (I, 93). She stated Mr. Johnson was completely undressed during the first incident of

intercourse, including his pants, and testified she had not noticed anything unusual about him at that time. (I, 95, 98).

Ms. Durham stated she could not recall telling the police she and Mr. Johnson had only been together in a relationship for a couple of months. (I, 93). When shown her prior testimony, she testified that they broke off the relationship in March, 2002. (I, 94).

While she stated in direct examination that there were other family members at Mr. Johnson's residence on the date they first engaged in sexual relations, she did not recall if she told the police there was anyone else there at the time. (I, 95). She admitted that in her prior testimony she had alleged the second act of sexual penetration had occurred at her house, when she was still 15. She also confirmed she had previously testified under oath that she had only engaged in sexual relations with Defendant on two occasions. (I, 97). She admitted she had not referred to a second act of intercourse at his house during her earlier testimony. (I, 98).

Ms. Durham admitted that during this same time period she was also engaging in sexual relations with a different male, and that this other man was the biological father of her baby. (I, 98). She denied intentionally lying by telling the police that Defendant was the father in order to protect the identity of the actual father. (I, 98-99).

The only other prosecution witness was Battle Creek Police Detective Brad Wise. He was assigned to investigate the complaint in this matter. (I, 103). He questioned Mr. Johnson. According to the officer, Defendant told him he was not sure if he was the father of Ms. Durham's baby, but was going to get a blood test to determine paternity. (I, 106). Det. Wise testified that Defendant admitted to him twice having sexual relations with Ms. Durham. (I, 107). According to the officer, when he told Defendant that Ms. Durham said she was 15 when they had sex, Mr. Johnson responded that he didn't know she was that age, and stopped having

sex with her once he heard rumors that she was only 15. (I, 107-108). He further told the officer he had been told by a third party, in the complainant's presence, that Ms. Durham was either 18 or 19, and that she had never told him her age or denied the comment that she was at least 18. (I, 108). He denied that their sexual relations were ever non-consensual. The officer indicated his contact with Mr. Johnson was in September, 2002. (I, 113).

In the letter the police confiscated from Ms. Durham Mr. Johnson wrote that she should try not to come to court to testify, or refuse to testify under the Fifth Amendment. (I, 111). In the letter he also wrote that if she testified she was 15 when they had sex, that was all the prosecution would need to convict him, so she should deny that they had sex, and/or should tell the police she had lied to him about her age. (I, 112).

On cross-examination Det. Wise acknowledged the police were contacted by Protective Services, and that neither Ms. Durham nor her mother ever filed a formal complainant. (I, 114-115). He confirmed that Ms. Durham told him she did not have sexual relations with anyone but Mr. Johnson during the time period in which her child could have been conceived. (I, 115). A search warrant for DNA samples from Defendant was obtained. (I, 115).

Following this testimony, the parties stipulated to entry of the DNA test results showing that Mr. Johnson is not the father of Ms. Durham's child. (I, 117). The parties also stipulated that fingerprints taken from the letter were determined to be Mr. Johnson's. (I, 118).

Once the prosecution rested, the defense moved for a directed verdict on both counts, in part due to the inconsistent testimony concerning the second alleged incident. The court denied the motion as to each count. (I, 119-121).

Defendant William Johnson was the only defense witness. He admitted to having prior convictions for breaking and entering in 1999, receiving and concealing in 2000, and for larceny

from a person in 2000. (I, 123). He stated he first met Ms. Durham in September, 2001. (I, 124). He acknowledged twice engaging in sexual intercourse with her, with the first instance occurring after December 24, 2001. (I, 124-125). He stated he knew it occurred after that date as he had been on electronic tether until December 24, due to his prior conviction and sentence, which prevented him from leaving his house without prior approval, and the act of sexual relations occurred after the tether had been removed from his ankle. (I, 125-126). He stated the tether box that had been on his ankle was fairly large and noticeable, particularly if he had his pants off. (I, 125-126). He stated the first sexual act occurred at his house, and the second, later act at Ms. Durham's house. (I, 126).

Defendant testified that both acts of sexual relations occurred after December 24. (I, 127). He denied engaging in any sexual acts with her during November, 2001. (I, 127). He did not have sex with her after March, 2002. Mr. Johnson stated he found out in March that she was 16, and stopped having sex with her because he believed it was illegal to have sex with a 16 year-old. (I, 128).

Mr. Johnson acknowledged that he later heard that Ms.Durham was pregnant, but denied she ever told him she believed him to be the father. (I, 128). He did not know if he was the father, and had believed it was possible since they had sex late in December.

Mr. Johnson admitted he wrote the letter that was admitted into evidence. (I, 129). He stated that he told Det. Wise that he thought Ms. Dunham was 16, not 15. (I, 130-131). He was told by Ms. Dunham's mother in late January or early February, 2002, that Ms. Dunham was 16. (I, 131).

On cross-examination Mr. Johnson denied that he wanted Ms. Dunham to lie on his behalf. (I, 132). He agreed that he did not want her to come to court, but denied he advised her

to lie about her age. He denied being worried that she was going to assert she was 15 when they had sex, stating that he mentioned 15 in the letter only because he had been told in court that if she was 15 he would be liable for a crime. (I, 135). Mr. Johnson stated he wrote other letters to Ms. Dunham that the prosecution had not introduced into evidence. Defendant agreed he had not told the officer that he only had sex with Ms. Dunham after he was off the tether, and that there was no mention of the tether in the letter. (I, 137, 139).

Following the final arguments and instructions of the court, the jury convicted Mr. Johnson on the two counts of third-degree criminal sexual conduct. (II, 22-23).

At the sentencing, the defense objected to the scoring of Mr. Johnson under Offense Variables 10, 11, and 19. The trial court overruled each of the objections. (ST, 3-10) As scored, the guidelines recommended a range for the minimum sentence of 99 to 320 months. The court imposed sentences of 100 to 480 months, as a fourth habitual offender. (ST, 12-13).

I. THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE PROSECUTION, OVER A TIMELY DEFENSE OBJECTION, TO IMPEACH MR. JOHNSON WITH EVIDENCE OF HIS PRIOR FELONY CONVICTIONS UNDER MRE 609.

Standard of Review:

The applicable appellate standard of review for this issue is abuse of discretion. See MRE 609; People v Allen, 429 Mich 558 (1988).

Argument:

Near the beginning of the trial, following the jury selection process but prior to the first witness, the trial prosecutor moved, out of the presence of the jury, for permission to impeach Mr. Johnson with evidence of his prior felony convictions if he elected to testify. (I, 55). The prosecutor proposed to use convictions for larceny from a person in 2000, breaking and entering from 1999, and receiving or concealing from 2000. (I, 55-56). Defense counsel responded that he objected to the use of any of these convictions for impeachment. (I, 56-57). Judge Garbrecht ruled the prosecution would be permitted to use the convictions if Mr. Johnson testified in his own behalf, stating the first two contained elements of theft, and that he did not believe the prejudicial impact of the impeachment outweighed their probative value. (I, 57).

Mr. Johnson did testify in his own behalf at trial. In his direct examination, he admitted to having the convictions for larceny from a person, breaking and entering, and receiving or concealing. (I, 123).[2] The jury was instructed that the evidence of these convictions could be considered only as to Mr. Johnson's testimonial credibility. (II, 17-18).

Under MRE 609, certain felony convictions can be introduced to impeach the credibility of a witness. If the prior conviction contains an element of "dishonesty or false statement" the

trial court has no discretion to prevent its use. If the conviction contains an element of theft, the trial court has discretion to admit the conviction for impeachment purposes, if it was punishable by imprisonment for more than one year or death, and "the court determines that the evidence has significant probative value on the issue of the credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect." MRE 609(a)(2)(B). In order to make that determination where the defendant is the witness at issue, the trial court must look at the age of the conviction and the degree to which the conviction is indicative of veracity, and contrast those determinations with whether the conviction was for similar conduct to the charge at issue and the possible effect on the decisional process if admitting the evidence causes the defendant to elect not to testify. MRE 609 (b). The trial court "**must** articulate, on the record, the analysis of **each** factor." MRE 609 (b). (Emphasis added). See also People v Allen, 429 Mich 558 (1988). A defendant must in fact testify, and be impeached with the prior convictions, to preserve the right to appellate review of the decision to permit impeachment. People v Finley, 431 Mich 506 (1988).

In the case at bar, the trial judge abused his discretion in permitting the prosecution to impeach Mr. Johnson with these three prior felony convictions. The trial court failed to articulate, on the record, the analysis of each factor. While first stating generally that credibility would be at issue in this case, the court held:

> ... it seems to me it does have a probative value. Given the nature of this offense, compared to what's being sought to be used for impeachment purposes, I don't believe that the prejudicial impact outweighs the probative value. And so should the Defendant testify, the Prosecution will be in a position to be able to impeach him, and I'll give the appropriate instruction..." (I, 57).

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[2] Under Michigan law, a defendant does not waive appellate review of a decision under MRE 609 to admit evidence of prior convictions for impeachment purposes by bringing out those convictions on direct examination. See People v Lester, 172 Mich App 769 (1988).

There was no express consideration made to the age of the prior convictions, and only a general statement that they were for different conduct than that alleged in this case. As to prejudicial impact, the trial judge made absolutely no mention of the factor of the impact on the decisional process if Mr. Johnson elected not to testify in order to preclude impeachment with the convictions. The trial court's ruling in this matter was not the sort of express weighing of the various factors required by the rule of evidence, but rather a conclusory and incomplete statement that the prosecution met its burden to show that the prior convictions were admissible.

Had the trial court expressly considered the factor of the impact on the decisional process if Mr. Johnson elected to testify, the decision on the impeachment may well have turned out differently. This case essentially came down to a one-on-one credibility battle between Ms. Dunham and Mr. Johnson as to when the sexual relations occurred. Defendant did not deny that he engaged in two acts of sexual penetration with Ms. Dunham, but insisted that they occurred subsequent to December 24, when he was taken off his tether, and thus beyond her 16th birthday. Ms. Dunham, while admitting she lied to the police about Mr. Johnson being the father of her baby and about not have relations with anyone else in 2001, and while changing her testimony from the preliminary examination as to the circumstances of the alleged acts, still claimed at trial that two acts occurred in November, while she was still 15. In this context, testimony from Mr. Johnson was essential to the defense theory, as it was likely there was no other possible witness who could have countered her assertion as to the dates. Had Judge Garbrecht expressly considered the impact of Mr. Johnson not testifying due to the impeachment ruling, he could have, and should have, ruled the prejudicial impact outweighed the probative value of the prior convictions to credibility.

The fact that Mr. Johnson was not deterred from actually testifying does not act as a waiver of the right to assert on appeal the trial court's failure to adequately consider all of the requisite factors, including the impact of him electing not to testify. As noted above, had Mr. Johnson not testified, he would have waived any right to appeal the 609 decision. Finley, supra. This Court's review is of the decision made by the trial court to allow admission of the evidence, and not of the defendant's decision to testify.

The admission of the prior convictions was prejudicial to Mr. Johnson. Even though the jury was instructed that the evidence was admissible solely for impeachment purposes, the potential existed that one or more of the jurors was unable to follow that instruction, and used the prior convictions as evidence of his character or propensity to engage in criminal behavior.

This Court should find the trial judge abused his discretion by failing to engage in the requisite analysis of each of the relevant factors under MRE 609, and in permitting the prior convictions to be used for impeachment. The resulting convictions should be reversed, and the matter remanded for a new trial.

II. DEFENDANT IS ENTITLED TO A RESENTENCING WHERE THE TRIAL COURT ERRONEOUSLY OVERRULED DEFENSE OBJECTIONS TO THE SCORING OF OFFENSE VARIABLES 10 AND 11.

Standard of Review:

The applicable appellate standard of review for the scoring of offense variables in the sentencing guidelines is abuse of discretion, with the trial court's scoring upheld if there is supporting evidence on the record. See People v Hornsby, 251 Mich App 462 (2002) .

Argument:

Mr. Johnson was convicted of two counts of criminal sexual conduct in the third degree, contrary to MCL 750.520d(1)(a). Under that subsection of the statute, the factor which made the alleged conduct criminal was solely the age of Ms. Dunham, who asserted she was 15 years old on the dates of the sexual penetrations. There was no allegation made in the case that Mr. Johnson used any degree or type of force or coercion to induce the sexual acts. Ms. Dunham alleged that the acts occurred during November, 2001, when she was approximately one month away from her 16th birthday. Mr. Johnson, while acknowledging that he had engaged in two acts of sexual penetration with Ms. Dunham, disputed the dates of those acts, asserted that both occurred after her birthday on December 14, 2001.

At the sentencing on the convictions, trial counsel for Mr. Johnson raised objections to the scoring of several of the offense variables under the legislative sentencing guidelines, including Offense Variables 10 and 11. (ST, 3-5). As initially scored, Mr. Johnson was assessed 10 points under OV 10, and 25 points under OV 11. The prosecutor argued in favor of that scoring. (PT, 5-6). Judge Garbrecht denied each objection, leaving the scoring as initially calculated. (ST, 7).

With that scoring, Mr. Johnson was assessed a total of 70 points under the Offense Variables, placing him in category V. Combined with his total of 107 points under the Prior Record Variables, which placed him in category F, the guidelines recommended a range for the minimum sentence, as a fourth felony offender, of 99 to 320 months.[3] The actual minimum sentence imposed of 100 months was only one month over the bottom of this range.

Judge Garbrecht erred in overruling the objections to the scoring of OV 10 and 11. Had the points assessed under those variables been deleted, Mr. Johnson would have scored only a total of 35 points, placing him in category IV, which would have reduced the recommended range for the minimum sentence to 87 to 290 months. As it is possible, if not likely, that the trial judge would have imposed a less severe minimum and/or maximum sentence under the correct guidelines scoring, this Court should, if the convictions are otherwise upheld, remand the matter for a resentencing.

Offense Variable 10:

Offense Variable 10 concerns an alleged exploitation of a vulnerable person. A scoring of 10 points, as in the case at bar, is appropriate if "the offender exploited a victim's physical disability, youth or agedness, or a domestic relationship or the offender abused his or her authority status." In this matter, the scoring was based solely on the fact of Ms. Dunham's age, as none of the other grounds for scoring 10 points could factually have applied on this record. Trial counsel for Mr. Johnson argued that no points should be scored as Ms. Dunham was only one month from her 16th birthday if her testimony was to be believed. (ST, 4). In response, the prosecutor asserted "the law is that someone who is under 16 cannot consent. The Legislature has deemed that they are not of an age to be able to consent. In that context, what happened is

[3] See Appendix A, copy of the Sentencing Information Report. The presentence report is being provided to this Court under separate cover.

clearly an exploitation based on the youth of the victim." (ST, 5-6). Judge Garbrecht did not make any specific finding as to the scoring of OV 10, noting only that the objections were overruled. (ST, 7).

The court's ruling was erroneous. The prosecution's argument was essentially that because the statutory provision relies on the age of the complainant, points should always be assessed under OV 10 for this type of conviction, regardless of the particular facts of the case. That position is neither legally nor logically correct. The Legislature recognized that the mere fact of the age of a complainant does **not** mandate the scoring of points under OV 10. In the instructions to this variable, the drafters wrote that "the mere existence of one or more of these factors does not automatically equate with victim vulnerability." Had the Legislature intended to mandate a scoring of 10 points in all cases where the conviction is under MCL 750.520d(1)(a) they could have easily expressed that intention in the instructions. Instead, they left the proper scoring to the trial court, in consideration of whether the individual facts of each case sufficiently demonstrate that the offender "exploited" the age.

To essentially require the scoring of at least 10 points under OV 10 in all cases under 520d(1)(a) would be unduly harsh. The fact of the age of the complainant, in the absence of any other aggravating factor, turns what otherwise would be legal conduct into a felony, punishable by up to 15 years in prison. To then aggravate the range for the minimum sentence due solely to that age, in the absence of factual proof that the accused manipulated or exploited the age, is overkill. The fact of the age, standing alone, is already taken into account in the guidelines, as the punishment itself is based on the complainant being below the statutory age of consent. Defendant is not asserting that the scoring of points under OV 10 is inappropriate in any case under 750d(1)(a). Where the facts of a particular case show sufficient exploitation of the age, or

of a relevant age differential between the accused and the complainant, scoring of points would be within the trial court's discretion. See, for example, People v Harmon, 248 Mich App 522 (2001); People v Phillips, 251 Mich App 100 (2002). However, the mere fact of the age does not, and should not, automatically require the scoring of 10 points.

In the case at bar, there was no evidence presented at trial, nor any relied upon at sentencing, that Mr. Johnson exploited or manipulated the complainant due to her age. As indicated, she was within a month, if she is to be believed, of reaching the age of consent. Mr. Johnson was 20 years old as of November, 2001. There was no assertion that their sexual relations were anything but factually consensual, even if not legally permitted. Ms. Dunham admitted at trial she was engaging in sexual relations with someone else (the father of her baby) during this time period, even though she lied to the police about that fact when first questioned. There was no assertion she was manipulated into engaging in the relationship with Mr. Johnson, or that she was particularly vulnerable due to her age. See People v Whetstone, 426 Mich 866 (1986) (adopting the dissenting opinion in the Court of Appeals concerning the predecessor guideline to OV 10); People v Scott, C.A. No. 169186, rel'd 8/3/94, attached as Appendix B. At most, this case presents a particularly non-egregious example of a violation of 520d(1)(a) – a fact Judge Garbrecht recognized by imposing a minimum sentence only one month over the lowest range of the guidelines as scored. There was no factual basis for imposition of the scoring of 10 points under OV 10, as Mr. Johnson did not exploit Ms. Dunham's age for his own purposes. The defense objection should have been granted, and the scoring under OV 10 reduced to zero.

Offense Variable 11:

Offense Variable 11 scores points for multiple criminal sexual penetrations. Under the guidelines, a score of 25 points, as in the case at bar, is appropriate where one criminal sexual

penetration occurred. However, the instructions for the guidelines state the court should score the penetrations of the victim by the offender "arising out of the sentencing offense," and that the penetration that forms the basis of a charge of first or third degree CSC is not scored. Further, the instructions state that any sexual penetrations of the victim by the offender that extend beyond the sentencing offense should be scored under OV 12 or 13.

In the instant case, there was no assertion by the complainant that any more than one penetration occurred during the commission of either of the sentencing offenses. Ms. Dunham merely testified that she engaged in penile-vaginal intercourse with Mr. Johnson on two different dates in November, prior to her 16th birthday. The two counts against him were based on those two alleged incidents.

In this matter the trial court erred in scoring the penetration that occurred during the second incident under OV 11 for the first, and vice versa. Trial counsel's objected that scoring under OV 11 should occur only when there are two or more alleged penetrations during a single incident. (ST, 4-5). In response, the prosecutor alleged the court could score due to the multiple counts:

> [MR. HEISS] As for Offense Variable 11, this is supposed to be looked at by the Court in terms of the context of the offenses. There were two Counts. There were two penetrations that were testified to.
>
> In terms of sentencing, on Count One: there is an additional penetration that is not the basis of Count One. In that respect, Offense Variable 11 is properly scored as 25 points. (ST, 6).

Judge Garbrecht then had a question about the scoring of Offense Variable 13. There was no defense objection to the scoring on that variable.[4] In responding to the court's question, the trial prosecutor again asserted that the penetration that forms the basis for Count II in this

[4] Mr. Johnson was assessed 25 points under OV 13, which concerns a pattern of criminal behavior over a five year period, based on his present conviction plus convictions for unarmed robbery in 2000 and larceny from a person in 1999.

case can be scored as an additional penetration under OV 11 for Count I. (ST, 7). Judge Garbrecht then ruled that the scoring of OV 11 was correct. (ST, 7).

The decision of the trial court was reversibly erroneous. It was directly contrary to the language of the variable and its instructions to score Mr. Johnson for any penetration that might have occurred separate from the incident that comprised the sentencing offense. The two counts in the case, which as the trial prosecutor admitted were the only two penetrations asserted by Ms. Dunham, occurred days if not weeks apart. Each sentencing offense consisted of **only** one penetration. Under the instructions, neither of those was scoreable under OV 11.

In People v Mutchie, 251 Mich App 273 (2002), the Court of Appeals interpreted the language "arising out of the sentencing offense" in OV 11 to mean that the trial court only scores those penetrations, other than the one that forms the offense, that occur "at the same place, under the same set of circumstances, and during the same course of conduct" as the penetration upon which the defendant is being sentenced. Accordingly, multiple penetrations occurring during that same incident are scored, even if they independently support convictions of their own, as in Mutchie, supra, but penetrations occurring at different times, places, or circumstances are not scored under OV 11, as in People v Bonner, C.A. No. 230514, rel's 1/17/03, attached as Appendix C. Those separate penetrations, however, can be scored under OV 12 (if they occurred within 24 hours of the sentencing offense and will not result in separate convictions) or OV 13 (if they occurred within five years of the sentencing offense).

In this matter, the penetration that formed the basis for Count II of the Information could not validly be scored under OV 11 for the purposes of sentencing on Count I, and vice versa. That penetration could have been scored under OV 13, but was not necessary as Mr. Johnson's

two other felony convictions for crimes against a person within the last five years, coupled with the conviction on Count I, were sufficient in themselves to justify the scoring of 25 points.

The trial court erred in overruling the scoring of 25 points under OV 11. No multiple sexual penetrations occurred during the sentencing offenses. This variable should have been scored at zero points, consistent with the timely defense objection.

The correct scoring of the Offense Variables should have been a total of 35 points (25 points under OV 13 and 10 points under OV 19). Had the court sustained the objections to the scoring under OV 10 and 11, Mr. Johnson would have placed in the F-IV rather than the F-V range, with the recommendation reduced to 87 to 290 months from 99 to 320 months. Because the erroneous scoring of OV 10 and 11 resulted in a higher range for the minimum sentence, Mr. Johnson is entitled to a resentencing. Bonner, supra.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court grant him leave to appeal, or any appropriate peremptory relief.

Respectfully submitted,

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BY: _____

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Dated: November 29, 2004.